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DISCUSSION OF RECENT DECISIONS

CORPORATIONS—CAPITAL, STOCK, AND DIVIDENDS—RIGHT OF PLEDGEE OF CORPORATE SHARES, BRINGING PERSONAL ACTION TO RECOVER LOSSES CAUSED BY MISCONDUCT OF OFFICERS AND DIRECTORS, TO BE REIMBURSED FOR EXPENSES AND ATTORNEY'S FEES INCURRED IN SUCH LITIGATION—The facts in the recent case of *Cannon v. Parker*¹ indicate that the plaintiffs sold all of their stock in certain related corporations to one of the defendants and then received back such shares in pledge as security for the payment of the unpaid balance of the sale price. Although no default had occurred in the payment of the secured installments, plaintiffs, not acting in any representative capacity, charged a conspiracy on the part of some of the defendants to pillage the various companies so as to cause a depreciation in the value of the securities held in pledge. They sought equitable protection of their rights as well as the appointment of a receiver for the several companies.

¹ 152 F. (2d) 706 (1946). Waller, C. J., wrote a dissenting opinion.

Some misconduct on the part of the officers and directors was found so a temporary injunction was granted restraining them from making further withdrawals from corporate funds. Receivership, however, was at first denied although one was finally granted to head off state court action in that respect. The proceeding remained pending until plaintiffs received the balance of the principal due them, substantially in advance of the maturity date, when a final report of the receiver was approved and the concerns were liberated to pursue their own course. No final decree was entered fixing the amount of the liability of the officers and directors,² nor was judgment awarded against them. For that matter, it did not appear that any of the funds improperly withdrawn were ever returned. Plaintiffs nevertheless applied to the trial court for an allowance of attorney's fees and that court ordered the same paid from funds in the hands of the receiver. On appeal solely as to the correctness of such allowance, the United States Circuit Court of Appeals for the Fifth Circuit, one judge dissenting, affirmed the award on the ground that plaintiffs' suit "necessarily would benefit the corporations and all stockholders," hence the plaintiffs were entitled to reimbursement.

The allowance of attorney's fees to the successful litigant as part of the costs of the case is usually denied³ in the absence of a contract providing therefor,⁴ some statutory basis authorizing recovery,⁵ or where the litigant has preserved assets or otherwise benefited others, to the extent that equity should require that "those who have shared in the benefits should contribute to the expense."⁶ As the instant case does not fall into either of the first two categories, it is possible to support the holding only on the latter proposition. It may be helpful to note that the authorities cited by the majority in support of their decision were cases of that type.⁷ There would seem to be some doubt, however, about the relevancy thereof.

Cases permitting the recovery of attorney's fees from the fund protected, preserved, augmented, or brought into being by the energy or

² The trial court fact-findings, however, indicated that substantial amounts were withdrawn in addition to salaries and dividends: 152 F. (2d) 706 at 708.

³ *Ryerson v. Apland*, 378 Ill. 472, 38 N. E. (2d) 712 (1942); *Smith, Ex'r v. McLaughlin*, 77 Ill. 596 (1875). Such expense may not even be recovered in a separate action predicated on the theory that the expense was a form of "damage" arising from defendant's malicious or fraudulent conduct in compelling plaintiff to litigate his claim: *Ritter v. Ritter*, 381 Ill. 549, 46 N. E. (2d) 41 (1943), reversing 313 Ill. App. 407, 40 N. E. (2d) 565 (1942), noted in 41 Mich. L. Rev. 1199.

⁴ Vide: the provisions of any typical promissory note or mortgage.

⁵ See, for example, Ill. Rev. Stat. 1945, Ch. 13, § 13, and Ch. 79, § 58.

⁶ 49 A. L. R. 1145 at 1152. A discussion of the Illinois law on the subject may be found in a note in 22 CHICAGO-KENT LAW REVIEW 159 to the case of *Bingham v. Ditzler*, 320 Ill. App. 88, 49 N. E. (2d) 812 (1943).

⁷ The court relied on *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157 (1882); *Central R. R., etc., Co. v. Pettus*, 113 U. S. 116, 5 S. Ct. 387, 28 L. Ed. 915 (1885); *Sprague v. Ticonic National Bank*, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184 (1939).

watchfulness of the litigant are typically cases in which that individual is motivated not alone by selfish concerns but where he sues as a representative of others whose interests he seeks to protect.⁸ The pledgees in the instant case, if the shares were registered in their names on the books of the companies,⁹ were sufficiently shareholders under the rule of *Green v. Hedenberg*,¹⁰ to justify them bringing a representative suit to protect the several corporations and the rights of the shareholders including themselves. But a pledgee of shares also possesses private rights to the protection or preservation of the pledged security which he can enforce in an independent suit brought in his own name and on his own behalf.¹¹ Any gain accruing therefrom would necessarily inure to his own benefit, although it might produce some incidental benefit for others. A suit of this character is not the typical case in which equity has compensated the energetic litigant by allowing him to impose some of the expense upon such others, for he can show no equitable reasons justifying such imposition.¹² As the instant case was purely an adversary rather than a representative proceeding,¹³ was brought to protect private rights, and merely provided incidental, if any, benefit to others,¹⁴ the basis for the allowance is not predicated on recognized doctrines.

There is further reason why the court should have denied, rather than granted, compensation for the legal services rendered. Even if the suit was representative in character, the plaintiff in the instant case did not preserve or protect an existing fund nor did he bring any fund into existence. It does not appear that he even so much as obtained a judgment against the defaulting officers and directors, whereas the doctrine in

⁸ See cases cited in note to *Sprague v. Ticonic National Bank*, 83 L. Ed. 1184 at 1187, note 3. See also 14 Am. Jur., Costs, § 74-5. The allowance may be made to intervenors who represent minority interests according to *First Nat. Bank v. LaSalle-Wacker Bldg. Corp.*, 280 Ill. App. 188 (1935).

⁹ *Fletcher, Cyc. Corp.*, Perm. Ed., Vol. 12, § 5646. See also Ill. Rev. Stat. 1945, Ch. 32, § 157.30.

¹⁰ 159 Ill. 489, 42 N. E. 851, 50 Am. Rep. 178 (1896). See also *Fletcher*, op. cit., Vol. 12, § 5651.

¹¹ *Baldwin v. Bradley*, 69 Ill. 32 (1873). See also 41 Am. Jur., Pledge and Collateral Security, § 51.

¹² *Standard Lumber Co. v. Interstate Trust Co.*, 82 F. (2d) 346 (1936), cert. den. 299 U. S. 545, 57 S. Ct. 8, 81 L. Ed. 401 (1936).

¹³ The complaint asked for "the protection of their rights as pledgees." The dissenting judge noted that the plaintiffs "did not invite other creditors to come in," so concluded that the case was an adversary proceeding brought by them "for their own benefit."

¹⁴ In *Sprague v. Ticonic National Bank*, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184 (1939), the individual action of the plaintiff seeking allowance for attorney's fees produced a direct rather than an incidental benefit for the decision vindicating her claims, by the doctrine of stare decisis, established the claims of others. The instant action produced no decision whatever, hence is distinguishable from that case. See also *Myers v. Mutual Life Ins. Co.*, 36 Ind. App. 328, 75 N. E. 31 (1905).

question, according to *Ham v. Norwood*,¹⁵ requires not only the rendition of a favorable judgment but also the successful collection thereof. As the test of benefit is not what the plaintiff sought to establish but what he did, in fact, accomplish by his suit, the majority decision seems to create an unwarranted innovation in the law. M. LEON

CORPORATIONS — DISSOLUTION AND FORFEITURE OF FRANCHISE — WHETHER OR NOT A STATUTE ENACTED AFTER DISSOLUTION WILL OPERATE TO PERMIT SUIT BY CORPORATION ON A CAUSE OF ACTION ACCRUING IN ITS FAVOR PRIOR TO DISSOLUTION.—In *Walden Home Builders, Inc. v. Schmit*,¹ an Illinois corporation sued to recover damages for breach of a contract made at a time when the corporation was in full existence. Subsequent to the making and the breach of the contract, but prior to the instant suit, the corporation had been dissolved by judicial decree at the instance of the Attorney General. Defendant moved to dismiss the action on the ground that the court lacked jurisdiction to entertain such a proceeding on behalf of a dissolved corporation. That motion was sustained and the action dismissed. Upon appeal, the Appellate Court for the First District reversed and remanded with directions to deny defendant's motion on the ground that the cause of action was preserved by Section 94 of the Business Corporation Act,² provided suit was begun within two years after dissolution, even though that statute was not enacted until after dissolution had occurred.

The rule had at one time been that dissolution of a corporation rendered it non-existent for all purposes,³ operated in much the same way as did the death of a natural person,⁴ and produced abatement of any pending action brought by the corporation.⁵ The same rule was also

¹⁵ 196 N. C. 762, 147 S. E. 291 (1929). In some jurisdictions the contribution must come from the creditors benefited and cannot be charged to the debtor as was done in this case: *German Nat. Ins. Co. v. Virginia State Ins. Co.*, 108 Va. 393, 61 S. E. 870 (1908).

¹ 326 Ill. App. 386, 62 N. E. (2d) 11 (1945).

² Ill. Rev. Stat. 1945, Ch. 32, § 157.94. Prior to 1941, only actions against the corporation, etc., survived a decree of dissolution and then only if suit was brought and service obtained within two years thereafter. By amendment of that year, Ill. Rev. Stat. 1941, Ch. 32, § 157.94, remedies available to as well as against the corporation, etc., survived dissolution. That amendment also requires no more than that suit be brought within two years. The statute was again amended by Laws 1945, p. 554, H. B. 563, but the change merely substituted the word "action" for the word "suit."

³ *Life Association of America v. Fassett*, 102 Ill. 315 (1882).

⁴ *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 257, 47 S. Ct. 391, 71 L. Ed. 634 (1927).

⁵ *The Greyhound*, 68 F. (2d) 832 (1934). See also *A. R. Young Const. Co. v. Dunne*, 123 Kan. 176, 254 P. 323 (1927), writ of error dismissed 276 U. S. 605, 48 S. Ct. 337, 72 L. Ed. 728 (1928). In *Hanson v. McLeod*, 174 Ark. 270, 294 S. W. 998 (1927), the court did permit a pending action for unpaid wages due an employee to continue despite dissolution but refused to permit an extension of the suit to include recovery of damages for breach of the employment contract.

applied where the duration of corporate existence expired with the lapse of time.⁶ The harshness of that rule has, however, usually been ameliorated by statutory provision preserving either to the creditor or to the corporation, or both, rights and remedies which were in existence on the day of dissolution.

The first such statute in this state, adopted in 1872, provided that a corporation could sue for a period of two years after dissolution to collect debts owing to it.⁷ That right was expanded in 1919 to permit it to sue generally, either at law or equity, for a like period of time,⁸ and comparable provision was made for the benefit of its creditors.⁹ In 1933, however, the older statutes were repealed at the time of the adoption of the present Business Corporation Act and, although the new law was designed to accommodate the corporation's creditors after its dissolution, nothing was said as to its ability to sue.¹⁰

During the interim between 1933 and 1941, a number of cases arose in Illinois respecting the right of the dissolved corporation to bring suit and in all such situations the courts were forced to hark back to common law principles.¹¹ In *Shore Management Corporation v. Erickson*,¹² for example, judgment by confession on notes owned by the plaintiff, a dissolved corporation, had to be set aside as a nullity because of lack of power to sue. Even more interesting is the decision in *Chicago Riding Club for use of Klein v. Avery*¹³ wherein garnishment was denied because the judgment debtor there concerned was unable, after dissolution, to enforce the debt sought to be reached in the garnishment proceeding. Similar holdings were attained in federal courts sitting within the state in *Laming v. National Ribbon & Carbon Paper Manufacturing Company*¹⁴ and in *Billiard Table Manufacturing Corporation v. First-Tyler Bank & Trust Company*.¹⁵ Even the United States Supreme Court was forced to the same conclusion in *Chicago Title & Trust Company v. 4136 Wilcox Building Corporation*¹⁶ when it denied an already dissolved corporation the

⁶ Chas. A. Zahn Co. v. United States, 6 F. Supp. 317 (1934).

⁷ Laws 1872, p. 296, § 10.

⁸ Laws 1919, p. 312, § 14.

⁹ Laws 1919, p. 334, § 79.

¹⁰ Laws 1933, p. 308, § 94.

¹¹ In *Markus v. Chicago Title & Trust Co.*, 373 Ill. 557, 27 N. E. (2d) 463 (1940), the Supreme Court indicated that, while the 1933 statute preserved actions on behalf of creditors against the dissolved corporation for only a limited time, a mortgage lien might still be foreclosed despite the expiration of the statutory period since the statute did not purport to affect existing liens.

¹² 314 Ill. App. 571, 41 N. E. (2d) 972 (1942).

¹³ 305 Ill. App. 419, 27 N. E. (2d) 636 (1940).

¹⁴ 40 F. Supp. 1005 (1941).

¹⁵ 16 F. Supp. 990 (1936). Actually heard in West Virginia, the case nevertheless turns on the effect of Illinois law on the subject.

¹⁶ 302 U. S. 120, 58 S. Ct. 125, 82 L. Ed. 147 (1937).

right to seek reorganization under the federal bankruptcy act on the theory that it possessed no capacity to be a petitioner for such relief.¹⁷ Until the 1941 amendment, therefore, a deficiency existed in the law of this state.

The instant case is the first which has arisen under the amendment of 1941 and the result achieved is clearly sound. It was argued that to permit the amendment to apply to a corporation which was already dissolved would be given retroactive effect to the statute.¹⁸ As that argument could scarcely be presented again in view of the fact that the statute has been in existence as long as it has,¹⁹ little need be said on that point. The present statute does not purport to revive extinct demands but to preserve remedies upon claims which have never ceased to exist. It serves to simplify proceedings incident to winding up, and supplies an omission by reviving an old policy. In view of the holding therein, it could be safely predicted that should another case be presented involving the situation found in the 4136 Wilcox Building case the United States Supreme Court would achieve an entirely different result for the act is now broad enough to permit the bringing of any "action or proceeding" to establish any remedy and is not limited merely to suits at law or in equity as was once the case.²⁰

J. E. JACOBS

CORPORATIONS—MEMBERS AND STOCKHOLDERS—WHETHER OR NOT BY-LAW PROVIDING FOR COMPUTATION OF DUES PAYABLE TO TRADE ASSOCIATION ON PERCENTAGE BASIS OF BUSINESS TRANSACTED IS OPPOSED TO PUBLIC POLICY—The validity of a corporate by-law was involved in the recent case of *Electrical Contractors' Association v. A. S. Schulman Electric Company*¹ in which case the plaintiff, a corporation organized not for profit, was permitted to recover unpaid dues from the defendant despite the claim that the by-law regulating the payment of dues was invalid because opposed to public policy. The trial court had denied recovery on the ground that such by-law was invalid inasmuch as it fixed the dues of the various members on a sliding scale, based on the

¹⁷ Creditors of such a corporation have, on the other hand, been permitted to maintain such proceedings: In re 69th & Crandon Bldg. Corp., 97 F. (2d) 392 (1938), cert. denied sub. nom. Easthom-Melvin Co. v. Hoffman, 305 U. S. 629, 59 S. Ct. 93, 83 L. Ed. 403 (1938).

¹⁸ Defendant relied on *Board of Education v. Blodgett*, 155 Ill. 441, 40 N. E. 1025, 31 L. R. A. 70, 46 Am. St. Rep. 348 (1895). That case differs from the instant one in that an attempt was made there to revive a cause of action barred by the statute of limitations.

¹⁹ Suits not already instituted by corporations dissolved prior to 1941 would be barred by the two-year limitation contained in Ill. Rev. Stat. 1945, Ch. 32, § 157.94. The issue could not arise as to corporations dissolved since then.

²⁰ Laws 1919, p. 312, § 14.

¹ 391 Ill. 333, 63 N. E. (2d) 392 (1945), affirming 324 Ill. App. 28, 57 N. E. (2d) 220 (1944).

amount of business transacted by each member, thereby tending to restrain trade and stifle competition. The Appellate Court for the First District reversed on the theory that the method adopted for calculating membership dues was a reasonable one and was not, intrinsically, illegal. Upon leave to appeal, the Supreme Court affirmed indicating that, in the absence of proof that the manner of collecting dues increased the contract price of the member's services to the general public, there was no basis for any assumption that public policy was violated.²

While parties are generally permitted the utmost freedom when contracting, any agreement which contravenes an express statute or a known public policy will be held void.³ For that reason, corporate or association by-laws designed to accomplish illegal purposes, since they form a species of contract, have been held invalid.⁴ Whether illegality exists, however, is a question of law rather than one of fact,⁵ so that if the by-law does not violate an express statute, the illegal nature thereof must be reasonably apparent.⁶

By-laws of the type involved in the instant case have, for these reasons, been criticized elsewhere. In *Kentucky Association of Highway Contractors v. Williams*,⁷ for example, the contractor, as a member of a non-profit incorporated association, was required under the by-laws to pay dues on a percentage basis on all public highway work placed under contract. The court held that, regardless of the fact that the association was organized not for profit and served laudable objects, the nature of the imposition was such that it created a tendency on the part of the member to desire to shift the burden on to the public by increasing the cost of public construction. That consequence was regarded as sufficient to make the by-law invalid whether the public cost was increased or not.

² An additional defense based on the claim that defendant, as a corporation for profit, could not be a member of an incorporated non-profit association, was rejected on a theory of estoppel. While Ill. Rev. Stat. 1945, Ch. 32, § 157.5, contemplates corporate participation in other enterprises, the language thereof would seem to indicate that such enterprises be conducted for profit. Section 163a7, dealing with non-profit corporations, would seem to fix no qualifications on membership therein except such as may be fixed in the articles of incorporation or by-laws.

³ *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127 (1910).

⁴ *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361 (1892). See also *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171 (1875); *Restatement, Contracts*, Vol. II, § 517.

⁵ *Tarr v. Stearman*, 264 Ill. 110, 105 N. E. 957 (1914); *Kuhn v. Buhl*, 251 Pa. 348, 96 A. 977, Ann. Cas. 1917D 415 (1916). Express declarations elsewhere that a given type of contract is legal have been followed in this state if not contrary to some local policy: *Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804, 68 Am. St. Rep. 194 (1898). See also 17 C. J. S., *Contracts*, § 615.

⁶ *Lamb v. Tomlinson*, 261 Ill. 388, 103 N. E. 1058 (1914); *Kellog v. Larkin*, 3 Pinn. (Wis.) 123, 56 Am. Dec. 164 (1851).

⁷ 213 Ky. 167, 280 S. W. 937, 45 A. L. R. 544 (1926). See also *Constructor's Ass'n of Western Pennsylvania v. Seeds*, 142 Pa. Super. 59, 15 A. (2d) 467 (1940).

A similar holding is to be found in the Wisconsin case of *Associated Wisconsin Contractors v. Lathers*,⁸ where it was indicated that if "the mere tendency or purpose of a contract works against public policy, it is illegal, even though no actual damage be shown."⁹ While the by-law in the instant case did not restrict the dues to a percentage of public contracts undertaken, the same reasoning would seem applicable for the membership of the association consisted of electrical contractors and dealers operating in Chicago engaged in public as well as private construction.¹⁰

Even more flagrantly opposed to public policy were the by-laws concerned in two other cases. That involved in the Kansas case of *Master Builders Association of Kansas v. Carson*¹¹ required the successful bidder to pay over a portion of the contract price to the association for distribution among the five next lowest bidders. Invalidity was apparent as the operation thereof tended to chill competition,¹² and obviously wrought damage to the public. In *Bailey v. Master Plumbers Association of Memphis*,¹³ a by-law which called for an assessment against the member who had accepted work in competition with any other member, being a restraint upon trade, was likewise declared invalid. The instant case does not present an identical situation to these last two cases, but it does come close to them in that the indirect, if not the direct, result of the method utilized would be to increase cost if not actually to stifle competition.

The professed purposes of the association here concerned were laudable ones. The method used to calculate dues was not an uncommon one¹⁴ and, as between the several members, undoubtedly an eminently fair way of apportioning the cost of the services rendered.¹⁵ But the fundamental argument seems to lie over the point whether injury to the public must, in fact, occur before a transaction is illegal or whether it is sufficient that there is tendency in that direction. Other states have

⁸ 235 Wis. 14, 291 N. W. 770 (1940).

⁹ 235 Wis. 14 at 17, 291 N. W. 770 at 771, citing 12 Am. Jur., Contracts, § 168.

¹⁰ 324 Ill. App. 28 at 35-6, 57 N. E. (2d) 220 at 223. At least two of the jobs performed by defendant during the period of membership were public ones. The fact that the membership did not include all such contractors is not significant: *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361 (1892).

¹¹ 132 Kan. 606, 296 P. 693 (1931).

¹² See Williston, Contracts, rev. ed., Vol. V, § 1663.

¹³ 103 Tenn. 99, 52 S. W. 853, 46 L. R. A. 561 (1899).

¹⁴ The court noted that a trade association survey prepared by the Department of Commerce in 1941 indicated that "out of a group of 204 national and regional associations selected at random approximately sixty-one per cent levy dues on a sliding scale in proportion to the size or volume of business." 391 Ill. 333 at 344, 63 N. E. (2d) 392 at 397.

¹⁵ Demonstration of the fairness of the method as between the several members is set forth in 324 Ill. App. 28 at 38-9, 57 N. E. (2d) 220 at 224.

held the mere tendency to be enough. The Illinois Supreme Court seems to think otherwise for it said "Unless there is proof that such percentage was added to the contract price, there is nothing that condemns it [the by-law] as being against public policy . . ." ¹⁶ No such proof being presented, it concluded the by-law was not invalid.

That result hardly squares with views heretofore expressed by that court. Although there are decisions indicating that actual harm is necessary before illegality is evident,¹⁷ the bulk of the earlier cases in this state would seem to hold that it is enough that the arrangement tends in that direction.¹⁸ The instant holding, therefore, not only differs from the rules applied to similar situations in other jurisdictions but seems out of line with local precedent.

E. JUSTUS

DIVORCE—ALIMONY, ALLOWANCES AND DISPOSITION OF PROPERTY—WHETHER OR NOT FUTURE EARNINGS OF NON-RESIDENT HUSBAND SERVED BY PUBLICATION, DUE FROM EMPLOYER WITHIN THE JURISDICTION, MAY BE SUBJECTED TO DECREE PROVIDING FOR THE PAYMENT OF ALIMONY—The question of whether or not a court of equity, sitting in a divorce proceeding, has jurisdiction to order alimony paid out of the husband's earnings, when he is a non-resident and has been served only by publication, was the prime issue in the recent case of *Mowrey v. Mowrey*.¹ The wife there filed a complaint for absolute divorce and was obliged to secure service on the principal defendant by publication as he was not a resident of the state. His corporate employer did business in Illinois, was subsequently included as a defendant, and was duly served. The amended complaint prayed that a fair and equitable amount of money in the employer's hands, accrued to or thereafter accruing to the husband as earnings, be paid to the plaintiff for the support of their children and for attorney's fees. After divorce had been granted, the employer was enjoined from paying a specified portion of the earnings and was

¹⁶ 391 Ill. 333 at 342, 63 N. E. (2d) 392 at 396. The court was of the opinion that any dues charged, whether on a flat rate or sliding scale basis, would be carried as an overhead charge so would be at least indirectly reflected in the bid price. It refused to infer that the public was going to be injured merely because dues were calculated on the percentage basis.

¹⁷ *Steen v. Modern Woodmen*, 296 Ill. 104, 129 N. E. 546, 17 A. L. R. 406 (1921); *Rleman v. Morrison*, 264 Ill. 279, 106 N. E. 215 (1914), reversing 184 Ill. App. 20 (1913); *Doane v. Chicago City Ry. Co.*, 51 Ill. App. 353 (1894), affirmed in 160 Ill. 22, 45 N. E. 507 (1895).

¹⁸ *Colgrove v. Lowe*, 343 Ill. 360, 175 N. E. 569 (1931), cert. den. 284 U. S. 639, 52 S. Ct. 21, 76 L. Ed. 544 (1931); *Linder v. Carpenter*, 62 Ill. 309 (1872); *Bestor v. Wathen*, 60 Ill. 138 (1871); *Liness v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153 (1867); *Cook v. Shipman*, 24 Ill. 614 (1860); *Limbach v. Vihon*, 210 Ill. App. 73 (1918); abst. opinion; *Hellen v. Anderson*, 83 Ill. App. 506 (1899). See also *More v. Bennett*, 41 Ill. App. 164 (1891), affirmed in 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216 (1892).

¹ 328 Ill. App. 92, 65 N. E. (2d) 234 (1946). Friend, P. J., dissented.

directed to accumulate the same. The husband, by special appearance, challenged the jurisdiction of the court to render a decree for alimony in view of the lack of personal service upon him and sought to have the injunctive order vacated. His motion was denied and the employer was directed to apply the fund so accumulated toward the satisfaction of the claim for support. On appeal from that order, the Appellate Court for the First District affirmed on the ground that the divorce proceeding was one in rem, ran against specific property within the jurisdiction, *i.e.* the earnings of the principal defendant, and that the alternative direction in the decree that the husband should personally pay or that the employer should do so from funds accrued did not make the decree a personal one.

It is well-settled law that where there is no personal service upon a defendant and no general appearance by him, there can be no personal judgment or decree rendered against him.² This principle has been applied to divorce cases and serves to make void any decree ordering the payment of alimony by a non-resident defendant who has been served only by publication.³ While such a decree may be valid as to the dissolution of the marriage relation, for a divorce proceeding is essentially a proceeding in rem,⁴ that part of the order which awards alimony is void as against the non-resident defendant because it is a personal decree for the payment of money and must rest upon jurisdiction in personam.⁵

The situation is different, however, where the defendant has property within the forum. If such property is (1) described in the complaint, is (2) proceeded against, and (3) by the terms of the decree is subjected to the payment of alimony, the action as to such property is substantially one in rem so that the decree possesses validity as against such property.⁶ The extent to which all of these conditions must be fulfilled, however, has been the subject of dispute. It is not necessary that a formal attachment be issued against the property in the jurisdiction,⁷ for it

² *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1878).

³ *Kelley v. Kelley*, 317 Ill. 104, 147 N. E. 659 (1925); *Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145 (1905); *Hood v. Hood*, 130 Ga. 610, 61 S. E. 471 (1908). See also *Hekking v. Pfaff*, 91 F. 60, 43 L. R. A. 618 (1898).

⁴ *Wilson v. Smart*, 324 Ill. 276, 155 N. E. 288 (1927); *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841 (1896); *Masure v. Masure*, 171 Ill. App. 438 (1912).

⁵ *Hekking v. Pfaff*, 91 F. 60, 43 L. R. A. 618 (1898); *DeLaMontanya v. DeLaMontanya*, 112 Cal. 101, 44 P. 345 (1896); *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405 (1891).

⁶ *Pennington v. Fourth National Bank*, 243 U. S. 269, 37 S. Ct. 282, 61 L. Ed. 713 (1917); *Forrester v. Forrester*, 155 Ga. 722, 118 S. E. 373 (1923); *Wesner v. O'Brien*, 56 Kan. 724, 44 P. 1090 (1896); *Wilson v. Smart*, 324 Ill. 276, 155 N. E. 288 (1927).

⁷ In *Jarvis v. Barrett*, 14 Wis. 591 (1861), the court said: "The essential fact upon which jurisdiction is made to depend is property of the defendant in the state, and not whether it has been attached—there is no magic about the writ of attachment which makes it the exclusive remedy." See also *Closson v. Closson*, 30 Wyo. 1, 215 P. 485 (1923).

has been stated that the "particular means to be used to subject the property of a non-resident, falls within the power of a court of equity, which can so mold its decrees as to give relief."⁸ There must, however, be something in the suit to make it, in effect, a proceeding against the property. These requirements were observed in the instant case, for the plaintiff served the employer with process, petitioned for the sequestration of property in its hands, and obtained an order to that effect. To that extent, therefore, the action was an action in rem or quasi in rem.⁹

The principal question involved in the case, however, was whether the husband's earnings were to be considered such "property" as would give the court jurisdiction.¹⁰ Putting the question in a slightly different fashion, it produces the query as to whether there is a property right in future earnings. That precise question has not arisen in Illinois before under circumstances similar to the instant case, but the Illinois courts, in other types of cases, have found that a person has a property right to the fruits of his labor.¹¹ Those cases concerned the right to contract freely as to the conditions upon which labor may be employed. In distinction, the real issue in the instant case was not whether the husband had a property right in his job which would be protected, but rather whether his so-called property right was one to which a jurisdiction in rem could attach in much the same fashion as if it were tangible property.

Precedents exist to the effect that other types of contingent interests can, on substituted service, be subjected to the payment of alimony. In *Tuttle v. Gunderson*,¹² for example, the trustees of a spendthrift trust for the benefit of a non-resident husband were impleaded and directed to sequester some of the income as it came into their hands, and to pay the same to the wife, on the theory that the wife and child had an equitable interest in the income for their support and maintenance because the testator unquestionably intended, by his will, to provide for

⁸ *Forrester v. Forrester*, 155 Ga. 722 at 731, 118 S. E. 373 at 377.

⁹ *Pennington v. Fourth National Bank*, 243 U. S. 269, 37 S. Ct. 282, 61 L. Ed. 713 (1917); *Hood v. Hood*, 130 Ga. 610, 61 S. E. 471 (1908); *Geary v. Geary*, 272 N. Y. 390, 6 N. E. (2d) 67 (1936).

¹⁰ Ill. Rev. Stat. 1945, Ch. 40, § 18, authorizes the court, in divorce cases, if it appears that "either party holds the title to property equitably belonging to the other," to compel conveyance thereof upon such terms as may be equitable.

¹¹ *Massie v. Cessna*, 239 Ill. 352, 88 N. E. 152 (1909), declared a statute unconstitutional which purported to limit the power to assign wages. A statute which required certain corporations to make weekly payment of wages was held invalid, in *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62 (1893), as depriving the parties of their liberty to contract. In *Mallin v. Wenham*, 209 Ill. 252, 70 N. E. 564 (1904), an assignment transferring wages to be earned in the future under existing employment was held valid, although the assignment was given as security for a loan made at usurious rates. See also *Frorer v. People*, 141 Ill. 171, 31 N. E. 395 (1892).

¹² 254 Ill. App. 552 (1929). See also *Shipley v. Shipley*, 187 Iowa 1295, 175 N. W. 51 (1919). It might be argued, however, that the future income from an established trust is a much more tangible and certain interest than the future wages of a husband who may change his employment or stop working at any time.

their support as well as for that of his son. In another case, that of *Cox v. Cox*,¹³ the husband owned a life insurance policy of the twenty-year tontine variety which had not yet become payable at the time of the filing of the suit.¹⁴ The court said that the contingent future interest was subject, in equity, to the right of the wife to have reasonable provision made for her support when the fund became due.¹⁵ In *Schneider v. Schneider*,¹⁶ a still more recent separate maintenance action, injunction was issued against certain corporations in which the non-resident husband held stock requiring them to pay into court "all sums of money then held and in their possession, which were due and owing to defendant." The decree was held applicable to dividends declared *after* the proceedings had been started, as the same were said to constitute a res within the jurisdiction of the court, control over which had been obtained because the corporations were doing business in Illinois. The case of *Cory v. Cory*,¹⁷ likewise regarded the proceeds of a fire insurance policy which had become payable to the husband as the proper subject of sequestration although the decree was reversed for lack of proper averments in the bill of complaint. The situation was compared to one where the court obtains jurisdiction over a garnishee indebted to a non-resident.¹⁸

There is a similar paucity of authority in other jurisdictions, with no case directly in point. In *Pennington v. Fourth National Bank*,¹⁹ a resident bank in which the non-resident husband maintained a deposit account was enjoined from paying out the deposit to the husband. The United States Supreme Court held that the injunction was as effective a seizure of the property as would have been a garnishment or the appointment of a trustee. The property which was sought to be reached in the Georgia case of *Forrester v. Forrester*²⁰ was the proceeds of a pending suit on a note which had not yet been reduced to judgment. Relief was denied because the maker of the note was not made a party to the divorce proceeding nor had the lower court actually seized the res by process of some sort. It was intimated, however, that these were

¹³ 192 Ill. App. 286 (1915). The proceedings were for separate maintenance rather than divorce, but the issue is no different in such proceedings.

¹⁴ The cash surrender value of an ordinary life insurance policy would, no doubt, be treated much like a bank account, especially if the policy itself was within the control of the court.

¹⁵ The common-law right of a wife to support and maintenance has not been abrogated by the Divorce Act: *Darnell v. Darnell*, 212 Ill. App. 601 (1918); *England v. England*, 223 Ill. App. 549 (1922).

¹⁶ 312 Ill. App. 59, 37 N. E. (2d) 911 (1941).

¹⁷ 249 Ill. App. 293 (1928).

¹⁸ *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 46 N. E. 631 (1897).

¹⁹ 243 U. S. 269, 37 S. Ct. 282, 61 L. Ed. 713 (1917). See also *Murray v. Murray*, 115 Cal. 266, 47 P. 37 (1896).

²⁰ 155 Ga. 722, 118 S. E. 373 (1923).

merely matters of procedure and did not affect the fundamental question of jurisdictional ability to subject the property to the alimony claim.

The problem posed by the instant case is really a jurisdictional one and is solved by those cases which see the presence of some form of property in the forum as the only requisite to confer authority to act.²¹ From there on, the means of subjecting such property to a support decree is purely a procedural matter.²² Without doubt, well-recognized forms of property such as bank accounts or land can be sequestered to enforce the payment of alimony. It now appears that future earning power can also be tapped for this purpose provided that earning power becomes translated into actual money due after jurisdiction has been obtained. There is some occasion to doubt, however, if a court of equity can exercise power through sequestration that could not be exercised by garnishment, attachment, or through execution, so it might be wise for the legislature to confirm such power.

J. A. WHITLOW

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION OF ESTATE—WHETHER EXECUTOR WHO IS GIVEN NO INTEREST IN REAL ESTATE CAN APPLY DEVISEE'S SHARE AGAINST DEVISEE'S INDEBTEDNESS TO TESTATOR IN PREFERENCE TO RIGHTS OF DEVISEE'S JUDGMENT LIEN CREDITOR—In the recent partition case of *Meppen v. Meppen*,¹ the plaintiff, in addition to seeking partition, asserted a lien over the portion of the proceeds of sale belonging to one of the defendants to satisfy the claim of the plaintiff, as executor under the will of the common ancestor, for repayment of an alleged advancement made to that defendant by the testatrix. The facts indicated that the devisee in question had borrowed money from the testatrix, his mother, prior to her death and had given a promissory note as evidence of the debt. Before maturity of the note, the testatrix died leaving a will which divided her real estate among certain of her children but which made no mention of the devisee's indebtedness nor conferred any interest in the land upon plaintiff as her executor. No attempt was made by the executor to enforce collection of the note after its maturity other than to apply the maker's share of the net rents toward the satisfaction of the debt. In the meantime, judgment had been rendered in favor of a bank against the devisee upon certain other indebtedness and the execution issued upon such judgment had been returned unsatisfied. As the devisee's share in the personal estate was insufficient to satisfy the demands of the executor and the judgment creditor, the latter asserted priority over the fund by reason of the lien created by

²¹ *Jarvis v. Barrett*, 14 Wis. 591 (1861).

²² *Forrester v. Forrester*, 155 Ga. 722, 118 S. E. 373 (1923); *Twing v. O'Meara*, 59 Iowa 326, 13 N. W. 321 (1882); *Wesner v. O'Brien*, 56 Kan. 724, 44 P. 1090 (1896).

¹ 392 Ill. 30, 63 N. E. (2d) 755 (1945).

the judgment. The plaintiff, on the other hand, contended that he enjoyed priority because of the nature of his claim. Plaintiff's claim was recognized by the decree of the trial court² and affirmed by the Appellate Court for the Second District.³ Leave to appeal was subsequently granted by the Illinois Supreme Court, however, and that court reversed with directions on the ground that while the executor could have reduced his claim to judgment, his failure to do so permitted the judgment creditor of the devisee to obtain a priority.

While prior Illinois decisions can be found involving somewhat similar situations,⁴ the exact question had never arisen before in this state so the instant case presented the first opportunity for the Illinois Supreme Court to make a choice between conflicting lines of authority followed elsewhere. By exercising that choice as it did, the court has placed this state in accord with the weight of authority.

Remark has often been made of the difference in relationship between the executor and the legatee on the one hand and the executor and the devisee on the other. In the case of the former, the executor has an interest in the personal assets before they reach the legatee so he may withhold the same until payment of the indebtedness due the estate is made.⁵ In the case of the latter, title and right to possession of real estate vests immediately in the devisee upon the death of the decedent according to the common law⁶ unless changed by statutory rule.⁷ Even if recourse to the real estate is necessary to satisfy the decedent's debts, the executor acquires no interest in the land prior to the institution of proceedings for that purpose so that the income therefrom, if any, inures to the benefit of the devisee.⁸ For that matter, the existence of a power of sale given to the executor is not enough to prevent title vesting in

² That decree appears to have been influenced by an earlier ruling upon a motion to dismiss the claim of the executor. The trial judge had granted such motion but he had been overruled by the Appellate Court on appeal from such ruling: *Meppen v. Meppen*, 321 Ill. App. 566, 53 N. E. (2d) 462 (1944).

³ 326 Ill. App. 83, 61 N. E. (2d) 411 (1945).

⁴ In *Coombs v. Phelps*, 236 Ill. 333, 86 N. E. 245 (1908), there was specific provision in the will for deduction of money loaned. See also *White v. Lewis*, 201 Ill. App. 105 (1915), abst. opinion; *Gray v. Hayhurst*, 157 Ill. App. 488 (1910); *Esmond v. Esmond*, 154 Ill. App. 357 (1909); *Lewis v. Lewis*, 150 Ill. App. 354 (1909); *Hesley v. Shaw*, 120 Ill. App. 92 (1905).

⁵ This is true even though action to recover on the indebtedness would be barred by the statute of limitations: *Fleming v. Yeazel*, 379 Ill. 343, 40 N. E. (2d) 507 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 277.

⁶ *Anderson v. Shepard*, 285 Ill. 544, 121 N. E. 215 (1918); *Emmerson v. Merritt*, 249 Ill. 538, 94 N. E. 955 (1911). See also *Phelps v. Grady*, 168 Cal. 73, 141 P. 926 (1914); *Cook v. Howe*, 280 Mass. 325, 182 N. E. 581 (1932).

⁷ *Peck v. Watson*, 165 Ga. 853, 142 S. E. 450, 57 A. L. R. 560 (1928). See also *In re Dayton's Estate*, 173 Okl. 180, 46 P. (2d) 933 (1935); *Stenson v. H. S. Halvorson Co.*, 28 N. D. 151, 147 N. W. 800, L. R. A. 1915A 1179 (1913).

⁸ That power may, of course, be conferred on the executor by will: *Lash v. Lash*, 209 Ill. 595, 70 N. E. 1049 (1904).

the devisee or heir although such title may be defeated by the subsequent exercise of the power.⁹ These differences are made more pointed by the language of the New Jersey case of *LaFoy v. LaFoy*¹⁰ where the court stated: "No act is necessary on the part of the executor to put the devisee in full enjoyment of the estate devised. The opportunity, therefore, could not arise for the executor to retain the debt of the devisee to the testator out of any demand which the devisee might seek to enforce against the executor. If such a charge attaches against the land devised, it would be necessary for the executor to establish it by proceedings in which he is the actor."¹¹ In the absence of such steps, therefore, the majority of jurisdictions have denied the executor priority over the devisee's other creditors.¹²

The Iowa case of *Schultz v. Locke*,¹³ involving a factual situation very similar to the present case, serves as the best illustration of the opposite view for there the court, while recognizing the general doctrine that real estate passes directly to the devisee, created an exception in a case where, as here, the devisee owed money to the estate and was otherwise insolvent. The equity behind such an exception is fairly strong, is borne out in other decisions following the minority view,¹⁴ and has tended to eliminate the necessity of a race between creditors of the devisee and the legal representatives of the decedent to see which one could first establish priority. As the Illinois statute is insufficient to prevent the devisee from obtaining title to the lands,¹⁵ it would seem to follow that, in case the judgment of the devisee's creditor is rendered prior to the death of the testator,¹⁶ that race would be lost by the legal representative before it had even started.

Under the circumstances, therefore, any person who makes an un-

⁹ *McCarty v. McCarty*, 356 Ill. 559, 191 N. E. 68, 94 A. L. R. 1137 (1934).

¹⁰ 43 N. J. Eq. 206, 10 A. 266, 3 Am. St. Rep. 302 (1887).

¹¹ 43 N. J. Eq. 206 at 207, 10 A. 266 at 266-7.

¹² The cases are listed in annotations in 1 A. L. R. 991 and 30 A. L. R. 775.

¹³ 204 Iowa 1127, 216 N. W. 617 (1927).

¹⁴ *Avery Power Machinery Co. v. McAdams*, 177 Ark. 518, 7 S. W. (2d) 770 (1928); *Koons v. Mellett*, 121 Ind. 585, 23 N. E. 95 (1889); *Warren v. Warren*, 143 Misc. 43, 255 N. Y. S. 206 (1932); *Keever v. Hunter*, 62 Ohio St. 616, 57 N. E. 454 (1900); *Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7 (1897). Use of such terms as "set-off", "offset," "retainer" and the like is technically incorrect in such cases: *Cherry v. Boulton*, 4 Mylne & C. 442, 41 Eng. Rep. 171 (1839).

¹⁵ Ill. Rev. Stat. 1945, Ch. 3, § 379, concerning sale to pay debts is limited to cases where the personal estate is insufficient to pay the debts or charges of the decedent, not those of the devisee.

¹⁶ It is familiar law that the lien of an existing judgment attaches to after-acquired property at the moment of its acquisition by the judgment debtor in preference to the rights of all except purchase money mortgagees, *Gorham v. Farson*, 119 Ill. 425, 10 N. E. 1 (1887), unless the other claimant can obtain the benefit of subrogation: *LaSalle Opera House Co. v. LaSalle Amusement Co.*, 289 Ill. 194, 124 N. E. 454 (1919).

secured loan to, or is surety for, the devisee named in his will should take suitable precautions to insure that the indebtedness so incurred will be repaid if the devisee is a person of limited means and there is no intention to excuse the liability thus created. That result might be obtained by adding a clause to the will declaring that the indebtedness constitutes an advancement,¹⁷ by making the same a charge upon the land devised, or by giving the executor a right of retainer to the extent of the balance unpaid at the testator's death. Of course, if the testator merely wishes to prevent the creditors of the devisee from getting the property, the use of the spendthrift trust would seem to be indicated. If no such provision is made, executors must hereafter reduce such claims to judgment promptly upon maturity and obtain execution thereon or run the risk of being charged with dereliction of duty should the rights of other creditors intervene.

N. McLEAN

HABEAS CORPUS—JURISDICTION, PROCEEDINGS AND RELIEF—WHETHER OR NOT COURT HAS POWER OR AUTHORITY TO APPOINT COUNSEL TO REPRESENT RELATOR IN HABEAS CORPUS PROCEEDINGS—The relator in the case of *People ex rel. Ross v. Ragen*,¹ detained in custody of respondent under sentence in a criminal case, filed an original petition before the Illinois Supreme Court for a writ of habeas corpus. After the writ had issued and respondent had filed a return, relator presented a motion to the court requesting that it appoint counsel to represent him in the habeas corpus proceeding, or in the alternative that he be brought before the court at the time of the hearing. His motion was denied when the court held that, as a habeas corpus proceeding is a civil proceeding, Section 9 of Article II of the state constitution and the comparable provision of the criminal code,² providing for appointment of counsel by the court, were inapplicable to the situation before it.

A habeas corpus proceeding is definitely civil in character,³ even where the relator is held under criminal process, for the proceeding is not a continuation of the criminal case but is a new suit at the instance of the relator seeking liberty.⁴ The court properly held, therefore, that the constitutional and statutory provisions above mentioned, which by

¹⁷ The provisions of Ill. Rev. Stat. 1945, Ch. 3, § 166, concerning advancements, are applicable to intestate estates only. The same result, however, may be attained by suitable language in the will: *Alward v. Woodard*, 315 Ill. 150, 146 N. E. 154 (1925).

¹ 391 Ill. 419, 63 N. E. (2d) 874 (1945).

² Ill. Const. 1870, Art. II, § 9; Ill. Rev. Stat. 1945, Ch. 38, § 730.

³ *Cross v. Burke*, Warden, 146 U. S. 82, 13 S. Ct. 22, 36 L. Ed. 896 (1892); *People ex rel. Guidotti v. Bell*, 372 Ill. 572, 25 N. E. (2d) 45 (1939); *Commonwealth v. Millen*, 289 Mass. 441, 194 N. E. 463 (1935); *Goetz v. Black*, 256 Mich. 564, 240 N. W. 95 (1932); *People ex rel. Curtis v. Kidney*, 225 N. Y. 299, 122 N. E. 241 (1919).

⁴ *Ex parte Tom Tong*, 108 U. S. 556, 2 S. Ct. 871, 27 L. Ed. 826 (1883).

their terms relate to criminal prosecutions, have no application to a habeas corpus or other civil proceeding.

The question of whether or not a court has power or authority to appoint counsel to represent a party in a civil proceeding, however, is not dependent upon those provisions. Comparable to the provisions placing a duty on the court to aid destitute persons in criminal prosecutions, as by appointing counsel and granting other assistance, statutes were enacted in England at an early time designed to assist poor persons in civil proceedings,⁵ and there is some reason to believe that they merely confirmed the common law.⁶ Illinois likewise possesses such a statute,⁷ and while the point here in question does not seem to have been raised under it or under the English or similar state statutes, Illinois courts have utilized the provision in other civil cases.⁸

On the other hand, the federal courts, under a similar statute,⁹ have been obliged to deal with the specific problem. When construing such a statute, they have held that it is a matter for the discretion of the lower court to determine whether a person invoking the benefit thereof should be permitted to pursue his action thereunder, and such determination will be sustained unless there is clear evidence of abuse of that discretionary power.¹⁰ In the case of *Whitaker v. Johnston*,¹¹ however, it was held that a naked request for the assistance of counsel in a habeas corpus proceeding furnishes no sufficient basis for the court to act. Even the filing of a pauper's oath concurrently with the petition for a writ of habeas corpus, according to *Brown v. Johnston*,¹² is not enough. Something more is necessary, and that is that there be some basis for the issuance of the writ.¹³ In *Ex parte Rosier*,¹⁴ therefore, it was held that where the petitioner was a poor person coming within the

⁵ See 2 Hen. VII, c. 12; 23 Hen. VIII, c. 15.

⁶ *Brunt v. Wardle*, 3 Mann. & G. 534, 133 Eng. Rep. 1254 (1841). See also *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135, L. R. A. 1918B 313 (1917).

⁷ Ill. Rev. Stat. 1945, Ch. 33, § 5, declares: "If any court shall . . . be satisfied that the plaintiff . . . is a poor person . . . the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties . . . without any fees, charge or reward." While the section appears to be permissive rather than mandatory, it is not confined in its operation to nisi prius courts and would seem applicable to the Supreme Court, at least in cases brought under its original jurisdiction.

⁸ *People ex rel. Barnes v. Chytraus*, 228 Ill. 194, 81 N. E. 844 (1907); *Consolidated Coal Co. v. Gruber*, 188 Ill. 584, 58 N. E. 254 (1901).

⁹ 28 U. S. C. A. §§ 832-5.

¹⁰ *Dorsey v. Gill*, 148 F. (2d) 857 (1945), cert. den. 325 U. S. 890, 65 S. Ct. 1580, 89 L. Ed. 2003 (1945).

¹¹ 85 F. (2d) 190 (1936).

¹² 91 F. (2d) 370 (1937).

¹³ *Hodge v. Huff*, 140 F. (2d) 686 (1944), cert. den. 322 U. S. 733, 64 S. Ct. 946, 88 L. Ed. 1567 (1944).

¹⁴ 133 F. (2d) 316 (1942).

purview of the statute, the petition was sufficient to show cause for the issuance of the writ, and there was likely to be a contest on questions of law and fact, appointment of counsel to represent the petitioner in the habeas corpus proceeding was deemed necessary.

Although in both the case last cited and the instant case there appears to have been cause for the issuance of the writ, there is a distinction between them. In the former, the petitioner took proper steps to claim the benefit of the statute; in the instant case, he did not. Technically, therefore, the decision of the court in denying the motion was correct. In view of the obvious purpose of the Illinois statute to afford relief, even in civil cases, to those who have just causes of action but who, for lack of means, would be prevented from adequately presenting the same, it would seem to follow that, were the matter properly presented, the courts in this state would appoint counsel to assist the unfortunate in habeas corpus proceedings. It is, to say the least, surprising to find the Illinois Supreme Court declaring that it is "neither authorized nor empowered to appoint counsel"¹⁵ for such persons unless it were to qualify such statement with the proviso that the authority is lacking unless the request is properly made. By utilizing the provisions of the existing statute, that court could readily aid both the petitioner and itself in the dispensation of justice.

L. J. PIGNATELLI

MORTGAGES—FORECLOSURE BY ACTION—WHETHER OR NOT STATUTE FIXING LIMIT BEYOND WHICH UNRECORDED EXTENSION OF MORTGAGE MATURITY DATE IS INEFFECTIVE TO PRESERVE LIEN REPEALS STATUTE BARRING FORECLOSURE MORE THAN TEN YEARS AFTER MATURITY—In *McCarthy v. Lowenthal*,¹ suit was brought to foreclose a trust deed securing a note dated February 11, 1930, which matured February 11, 1933. The action was instituted more than ten years after the maturity date. Defendant moved to dismiss the suit on the ground that the action was barred by Section 11 of the Limitations Act.² That motion was sustained. Plaintiff appealed, contending that his action came within Section 11b of the statute,³ which, plaintiff claimed, had operated to repeal the

¹⁵391 Ill. 419 at 423, 63 N. E. (2d) 874 at 875.

¹ 327 Ill. App. 166, 63 N. E. (2d) 666 (1945).

² Ill. Rev. Stat. 1945, Ch. 83, § 11, enacted in 1872, declares: "No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues."

³ Ibid., § 11b, adopted in 1941, in part directs that the "lien of every mortgage . . . shall cease by limitation after the expiration of twenty years from the time the last payment . . . becomes due . . . according to its written terms, unless the owner of such mortgage . . . either (1) . . . has filed . . . an extension agreement . . . or (2) . . . an affidavit . . . stating the amount or amounts claimed to be unpaid . . . The filing . . . shall extend the lien for a period of ten years. . . ."

earlier section by implication. The Appellate Court for the First District affirmed the decree when it found no repugnancy between the two sections of the statute and held that the case came within the earlier provision.

Prior to the enactment of Section 11b and its predecessor section,⁴ the law of this state had been quite generous on the question of the enforceability of a mortgage lien, not only as between the parties⁵ but also as to third persons,⁶ for it recognized that no period of limitation was running against the same during its original term or while the debt remained effective because of an extension thereof.⁷ Extension of the indebtedness was sufficient to keep the lien alive without the necessity of the execution of any formal written agreement and without requiring any recordation, as it was not necessary that subsequent purchasers should have any other notice than that provided by the fact that the original mortgage remained unreleased. In *Metcalf v. Metcalf*,⁸ therefore, the court declared that one who takes title to land, with knowledge from the public records that there is an unreleased trust deed or mortgage thereon, takes with notice that the land is subject to said trust deed or mortgage unless the debt purported to be secured is in fact barred.⁹ As payment on the secured note or any extension thereof tolls the running of the statute,¹⁰ third persons dealing with the mortgaged premises were obliged to ascertain such facts as these, to be found extrinsic of the record, at their peril. No reliance could be placed on the assumption that an ancient mortgage, because of its age, was necessarily barred for, if the debt was still enforceable as between the parties, the lien created by recording was still an enforceable lien against all the world despite its age.

The act of the legislature in adopting Section 11b can only possess meaning in the light of this background. There was no need, as between the original parties, to enact additional legislation for existing law was sufficient to cover their needs. If, as between them, the debt was still a valid obligation because a suit on the note had not become barred,¹¹ then the lien was likewise to be regarded as a known and an enforceable

⁴ Laws 1935, p. 951, repealed in 1941 at the time of the enactment of Section 11b.

⁵ *Stein v. Kaun*, 244 Ill. 32, 91 N. E. 77 (1910).

⁶ *Richey v. Sinclair*, 167 Ill. 184, 47 N. E. 364 (1897).

⁷ In *Kraft v. Holzman*, 206 Ill. 548 at 549, 69 N. E. 574 (1904), the court said: "We have repeatedly held in such cases that the debt is the principal thing, and the mortgage or trust deed but an incident thereto; that section 11 of the limitation act must be construed in connection with section 16, applicable to promissory notes, and the mortgage will not be barred until the debt is barred."

⁸ 219 Ill. App. 96 (1920).

⁹ See *Murray v. Emery*, 187 Ill. 408, 58 N. E. 327 (1900).

¹⁰ *Munyon v. Wilson*, 322 Ill. App. 680, 54 N. E. (2d) 609 (1944); *Stein v. Kaun*, 244 Ill. 32, 91 N. E. 77 (1910); *Schifferstein v. Allison*, 123 Ill. 662, 15 N. E. 275 (1888); *Lathrop v. Carrol*, 155 Ill. App. 653 (1910).

¹¹ See Ill. Rev. Stat. 1945, Ch. 83, § 17.

one.¹² If, on the other hand, the debt was barred, then the lien was gone.¹³ To enact two varying statutes on the same subject concerning the rights of the same persons would obviously lead to some repugnancy and justify the contention that the later one had overruled the former.¹⁴ But the adoption of another statute on the same subject, so long as it is designed to affect the rights of an entirely different group of persons, creates no such repugnancy.¹⁵ Both may be regarded as operating *in pari materia* provided the earlier law is not expressly repealed by the later one. The court in the instant case, therefore, properly held that the later statute, as it had no bearing on the rights of the original parties to the mortgage transaction, did not operate to repeal the earlier law.

Foreclosure suits filed hereafter must now be tested, on the question of limitation, by these two statutory provisions. If Section 11 applies, as where the debt matured more than ten years before suit and there has been no interim payment or extension, the mortgage lien is destroyed as to all persons.¹⁶ If not, then under Section 11b the lien may be enforceable against the mortgagor or persons liable thereon by reason of extension, part payment or assumption, but may turn out to be barred as to third persons if no notice has been given to them by recording in the fashion required by statute. The mortgagee needs to be warned that full public disclosure of the facts is the price he must pay to preserve his lien.

R. M. ROHN

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—WHETHER OR NOT NEGLIGENCE OF OWNER OR DRIVER OF PRIVATE VEHICLE MAY BE IMPUTED TO OCCUPANT THEREOF—In the recent Michigan case of *Bricker v. Green*,¹ a suit for wrongful death, it appeared that one Mrs. Bradshaw had been killed in an automobile collision produced by the concurrent negligence of her husband, driving the car in which she was riding, and the defendant. Mrs. Bradshaw, however, was free from any contributory negligence. The trial court directed a verdict in favor of the defendant on the ground that the husband's negligence was imputable to the deceased victim so as to bar any action. On appeal, the Supreme Court of Michigan reversed that holding and, in so doing, overruled a long-standing line of former decisions on the question of imputed negligence.² It ruled

¹² *Watts v. Hoffman*, 77 Ill. App. 411 (1898).

¹³ *Pollock v. Maison*, 41 Ill. 516 (1866).

¹⁴ *Village of Atwood v. Cincinnati, I & W. R. Co.*, 316 Ill. 425, 147 N. E. 449 (1925).

¹⁵ *City of Chicago v. Quimby*, 38 Ill. 274 (1865).

¹⁶ *Harris v. Mills*, 28 Ill. 44 (1862).

¹ 313 Mich. 218, 21 N. W. (2d) 105 (1946).

² The doctrine had first been established for that state in *L. S. & M. S. R. R. Co. v. Miller*, 25 Mich. 274 (1872). See also *Mullen v. City of Owosso*, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693, 43 Am. St. Rep. 436 (1894).

that, in the absence of a showing of the relation of principal and agent, master and servant, or joint enterprise between the husband and wife, and in the absence of a showing of contributory negligence on the part of the wife, the husband's negligence as driver of the automobile could not be imputed to the wife so as to bar a right of action.

By such decision Michigan became the last state in the Union to abandon the imputed negligence rule which had been developed, in 1849, in the leading English case of *Thorogood v. Bryan*.³ The wife there had sued to recover for the death of her husband, passenger in an omnibus, who was killed when he negligently stepped out of it into the path of another vehicle. In deciding for the defendant, driver of the second carriage, the court made a statement, since reiterated by all courts following the rule, to the effect that a "passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury."⁴ The decision was not popular and the doctrine announced was overruled in England in 1888 by the case of *Mills v. Armstrong*.⁵

In this country the doctrine had been criticized and rejected as early as 1886, when the United States Supreme Court declared that identification "of the passenger with the negligent owner or driver without his personal cooperation or encouragement, is a gratuitous assumption. There is no such identity . . . Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world."⁶

Some states adhered to the rule, however,⁷ and Michigan originally applied it without any discussion or citation of authority. Denying recovery to a passenger, a court of that state once said: ". . . as she [plaintiff] was riding with Eldridge, owner and driver of the team, any negligence of Eldridge equally affects her rights in this suit."⁸ The plaintiff in that case was an employee of Eldridge, lived with him, and was identified with him in that way, but the trip apparently did not arise out of any master-servant relationship. It was shown, however, that the plaintiff, as well as the driver, was negligent in not keeping a lookout. Despite these grounds for distinction, the case continued to be cited as precedent even though no master-servant relationship existed

³ 8 C. B. 115, 137 Eng. Rep. 452 (1849).

⁴ 8 C. B. 115 at 130, 137 Eng. Rep. 452 at 458.

⁵ Sub nom. "The Bernina," 13 App. Cas. 1 (1888), affirming 12 P. D. 58 (1886).

⁶ *Little v. Hackett*, 116 U. S. 366 at 375, 29 L. Ed. 652 at 655 (1886). See also *N. Y., L. E. & W. R. R. Co. v. Steinbrenner*, 47 N. J. L. 161 (1885).

⁷ *McFadden v. Santa Ana, O. & T. St. Ry. Co.*, 87 Cal. 464, 25 P. 681 (1891); *Peck v. N. Y. Railroad Co.*, 50 Conn. 379 (1882); *Prideaux v. City of Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558 (1878).

⁸ *L. S. & M. S. R. R. Co. v. Miller*, 25 Mich. 274 at 276 (1872).

and the plaintiff was in no way contributorily negligent.⁹ Application of the rule, in Michigan, was later trimmed down for the courts there have allowed recovery by passengers of public carriers for hire,¹⁰ by minor passengers,¹¹ by invited guests,¹² and finally by passengers of private carriers for hire.¹³ The rule continued to be applied, however, as between husband and wife until the decision in the instant case.

The "identification" of passenger with driver, spoken of in the cases as being the ground for denying recovery to a passenger,¹⁴ is always a question of fact, namely, whether the passenger exercises control, or has a right of control, over the driver so as to constitute the relation of master and servant, or principal and agent, between them,¹⁵ or whether the driver and passenger are engaged in a joint mission or enterprise.¹⁶ A recent Illinois case, that of *Serletic v. Jeromell*,¹⁷ sets out the now unanimous rule clearly. There the wife and child were passengers of the husband and father, but the court refused to hold that the driver's negligence could be imputed to either of them. As the averment of an agency relationship between husband and wife was not supported by any evidence, it was said that no such relationship arose between them as a matter of law. With respect to the four-month old child, the court said that such an infant was incapable of creating an agency relationship as a matter of law.¹⁸

In deciding what facts constitute such a control or joint enterprise as will bar a passenger's recovery, courts have denied recovery where the wife was driving the husband's car and the husband was accompanying her;¹⁹ where the wife owned the car and the husband drove;²⁰

⁹ *Holsaple v. Superintendants of Poor*, 232 Mich. 603, 206 N. W. 529 (1925).

¹⁰ *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32 (1881).

¹¹ *Battishill v. Humphery*, 64 Mich. 503, 31 N. W. 894 (1887); *Shippy v. Village of Au Sable*, 85 Mich. 280, 48 N. W. 584 (1891).

¹² *Mampel v. Detroit, G. R. & W. Ry. Co.*, 138 Mich. 1, 100 N. W. 1002 (1904).

¹³ *Lachow v. Kimmich*, 263 Mich. 1, 248 N. W. 531 (1933).

¹⁴ *Little v. Hackett*, 116 U. S. 366, 29 L. Ed. 652 (1886); *Thorogood v. Bryan*, 8 C. B. 115, 137 Eng. Rep. 452 (1849).

¹⁵ *Smithers v. Henriquez*, 368 Ill. 588, 15 N. E. (2d) 499 (1938); *Hazel v. Hoopston-Danville Motor Bus Co.*, 310 Ill. 38, 141 N. E. 392 (1923).

¹⁶ *Lindquist v. Thierman*, 216 Iowa 170, 248 N. W. 504, 87 A. L. R. 893 (1933); *Kokesh v. Price*, 136 Minn. 304, 161 N. W. 715 (1917).

¹⁷ 324 Ill. App. 233, 57 N. E. (2d) 896 (1944). See also *Fitzpatrick v. California & Hawaiian Sugar R. Corp.*, 309 Ill. App. 215, 32 N. E. (2d) 990 (1941).

¹⁸ In *Palmer v. Miller*, 380 Ill. 256, 43 N. E. (2d) 973 (1942), it was held that a minor only two months short of his majority could not establish the contractual relationship of master and servant or principal and agent.

¹⁹ *Lawson v. Jorjorian*, 293 Ill. App. 431, 12 N. E. (2d) 894 (1938); *Gochee v. Wagner*, 257 N. Y. 344, 178 N. E. 553 (1931).

²⁰ *Guy v. Union St. Railway Co.*, 289 Mass. 225, 193 N. E. 740 (1935); *Ballou v. Fitzpatrick*, 283 Mass. 336, 186 N. E. 668 (1933). Contra: *Rodgers v. Saxton*, 305 Pa. 479, 158 A. 166 (1931).

where the husband was driving while drunk and the wife knew he was drunk;²¹ where the vehicle was jointly owned;²² where the wife's petition stated that "she and her husband were operating the automobile;"²³ where the expenses of the trip were shared equally;²⁴ and where all passengers had an equal right to direct the operation of the car, by agreement.²⁵

On the other hand, the facts have been held to show an insufficient community of interest to bar such an action where the passenger merely indicated the route to be travelled on a common joy-ride;²⁶ where the passenger paid the expenses of a party at the destination;²⁷ where the guest drove the car part of the way to the village to which both were going for the same purpose;²⁸ where the husband drove without lights and the wife protested from the back seat;²⁹ and where husband and wife, with two children, were going fishing together.³⁰

It can be argued that a passenger of a hired vehicle, having procured the vehicle and obtained the services of a driver, thereby has more right of control over the vehicle's use, and over the driver, than has a mere gratuitous passenger. The fact then that Michigan had abandoned the doctrine of imputed negligence in cases of hired vehicles while retaining it for gratuitous passengers such as a wife was incongruous. The holding in *Bricker v. Green* was overdue, but now that the case has been decided the law of Michigan is brought into uniformity with the law in other jurisdictions.

J. A. WHITLOW

PHYSICIANS AND SURGEONS—REGULATION OF PROFESSIONAL CONDUCT—WHETHER OR NOT THE PRACTICE OF OPTOMETRY IS A LEARNED PROFESSION SUBJECTING IT TO THE REGULATION AND CONTROL ACCORDED TO SUCH PROFESSIONS—In the recent case of *L. Klein, a corporation, v. Rosen*,¹ the Illinois Appellate Court was called upon to determine whether or not the practice of optometry² could be considered a learned profession comparable with that of law, medicine or dentistry and thereby held to

²¹ *Chapman v. Powers*, 150 Miss. 687, 116 So. 609 (1928).

²² *Perrin v. Wells*, 22 S. W. (2d) (Mo. App.) 863 (1930). Not officially reported.

²³ *Lindquist v. Thierman*, 216 Iowa 170, 248 N. W. 504 (1933).

²⁴ *Beaucage v. Mercer*, 206 Mass. 492, 92 N. E. 774 (1910). The same rule has been applied to a guest: *Barnett v. Levy*, 213 Ill. App. 129 (1919).

²⁵ *Wiley v. Dobbins*, 204 Iowa 174, 214 N. W. 529 (1927).

²⁶ *Pope v. Halpern*, 193 Cal. 168, 223 P. 470 (1924); *Barry v. Harding*, 244 Mass. 588, 139 N. E. 298 (1923).

²⁷ *Adamson v. McEwen*, 12 Ga. App. 508, 77 S. E. 591 (1913).

²⁸ *Hollister v. Hines*, 150 Minn. 185, 184 N. W. 856 (1921).

²⁹ *McLaurin v. McLaurin Furniture Co.*, 166 Miss. 180, 146 So. 877 (1933).

³⁰ *Kokesh v. Price*, 136 Minn. 304, 161 N. W. 715 (1917).

¹ 327 Ill. App. 375, 64 N. E. (2d) 225 (1945).

² Ill. Rev. Stat. 1945, Ch. 91, §§ 90-105.

the same standards of regulation. The plaintiff, a corporation, operating a department store, sued a former employee to enjoin him from using customers' lists and data compiled in the course of his prior employment while working in the optical department of the store as an optometrist. After terminating his employment, defendant used such duplicate customers' list, containing data of examinations made and optical corrections prescribed, to solicit the plaintiff's former customers with a resultant loss of trade to plaintiff. The main defense to the action was that no suit should be permitted as the plaintiff, being a corporation, could not employ licensed optometrists. That defense was based on the ground that optometry, being a learned profession, was of such nature as to prohibit corporations from participating or engaging in the practice thereof. The complaint, on motion, was dismissed by the trial court, but on appeal the decree was reversed upon a finding by the Appellate Court that the practice of optometry is not a learned profession.

There can be no doubt that many callings started out on a plane even with all the rest but, as civilization progressed, certain callings, because of their greater importance and because of advancements made in skill and knowledge in those fields, developed a recognized pre-eminence which we now describe by the use of the term "profession."³ From these professions, a still higher field or class has emerged which we today denominate as the "learned professions." There is no specific or set rule by which to determine whether a certain calling is a "profession" or a "learned profession," for the courts are not in accord either as to methods for ascertaining the fact or as to the final result. A Massachusetts court, in *McMurdo v. Getter*,⁴ has suggested that the best way to arrive at a conclusion on this point is to compare the practice under consideration with that of an already accepted learned profession to see if the former approaches, and if so how closely, the standards of the latter. By comparing the practice of ophthalmology with that of optometry, it came to the conclusion that the latter was a learned profession, saying: "The learning and ethical standards required for that work, and the trust and confidence reposed in optometrists by those who employ them, cannot be dismissed as negligible or as not transcending the requirements of an ordinary trade."⁵

If the practice of optometry could be considered to be that of a learned profession, a reasonable question arises as to whether corporations may employ optometrists or incorporate for the practice of optometry. That question was answered in the case of *State ex rel. McKittrick v.*

³ The history and development of the practice of law shows that it is an exception to such a general rule, for the practice of law has always been treated as a learned profession.

⁴ 298 Mass. 363, 10 N. E. (2d) 139 (1937).

⁵ 298 Mass. 363 at 369, 10 N. E. (2d) 139 at 143.

*Gate City Optical Company*⁶ where the court held that a corporation, under common law, possessed all of the rights that an individual had so that a court could not place any qualifications or restrictions barring corporations from exercising such rights unless the legislature had seen fit to pronounce some prohibition. Legislative enactments in some states, however, do specifically prohibit corporations from incorporating for the purpose of practicing optometry or from employing licensed optometrists to conduct such enterprises.⁷ A Massachusetts provision which goes even farther than most, prohibiting unlicensed persons from engaging in such practice either directly or indirectly, was upheld in *Kay Jewelry Company v. Board of Registration*.⁸ Along the same line is an interesting decision rendered by a South Carolina court, that of *Ezell v. Ritholz*,⁹ where the court indicated that to permit corporate employment of optometrists would provide a "stepping stone" whereby other professions, such as law, medicine, and dentistry, could be practiced in the same manner. It felt that the commercialization of such practice would destroy all personal responsibility which the ethics of that profession demands.

It is the opinion of a majority of the courts, however, that optometry cannot be considered as a learned profession. That view is best expressed in the Maryland case of *Dvorine v. Castelberg Jewelry Corporation*,¹⁰ where the court found that the practice of optometry involves merely manual dexterity and skill in the operation of precision instruments and that, as such, it was said to be "empirical rather than learned." A commonplace habit of mistakenly putting such practices upon a similar plane as that of medicine, an Illinois court once noted, is "merely illustrative of a euphemistic trend, apparent in recent years, of converting age old common callings into something new and strange, not by changing their characteristics, but by describing them in more dignified and sonorous terms."¹¹ Again, a federal court, in the case of *Silver v. Lansburgh & Bros.*,¹² refused to regard optometry as a learned profession as it lacked

⁶ 339 Mo. 427, 97 S. W. (2d) 89 (1936).

⁷ See, for example, *Teseschi v. Mathis*, 116 N. J. L. 187, 183 A. 146 (1936); *Rowe v. Standard Drug Co.*, 132 Ohio St. 629, 9 N. E. (2d) 609 (1937); *State ex rel. Bricker v. Buhl Optical Co.*, 131 Ohio St. 217, 2 N. E. (2d) 601 (1936).

⁸ 305 Mass. 581, 27 N. E. (2d) 1 (1940).

⁹ 188 S. C. 39, 198 S. E. 419 (1938).

¹⁰ 170 Md. 661, 185 A. 562 (1936).

¹¹ See *Babcock v. Nudelman*, 367 Ill. 626, 12 N. E. (2d) 635 (1937). The court noted, however, that by the passage of the Optometry Act, Ill. Rev. Stat. 1945, Ch. 91, § 90 et seq., the legislature intended to create a recognized class in the nature of a profession similar to persons practicing medicine, surgery, or dentistry, and to elevate the calling to that of a profession or skilled occupation.

¹² 111 F. (2d) 518, 128 A. L. R. 582 (1940). It is interesting to note, however, that in deportation proceedings a different view has prevailed. In *Ex parte Aird*, 276 F. 954 (1921), class A draftsmen of vessels were held to be members of a learned profession, while in *United States ex rel. Liebmann v. Flynn*, 16 F. (2d) 1006 (1926), accountants were given a similar classification.

the relationship of trust and confidence which is traditional of other learned professions. Legislation calling for the licensing of those who might practice optometry, there considered, was regarded as being designed merely to protect the public against incompetent service. Other statutory enactments have been said to be designed not merely to create a monopoly in favor of optometrists but to be purely for the protection of the public,¹³ so long as the employment of optometrists is not forbidden.¹⁴ Under such statutes, the law is not interested in the compensation agreed upon or the method of its calculation.¹⁵

The only reasonable conclusion which can be drawn at present from the instant case is that, at this time, it has been properly decided that the practice of optometry has not yet reached the level of the learned professions. But the trend would seem to be in that direction, so that some day it can be expected that corporations or other unauthorized persons will not be able to employ optometrists and profit by their skill and may be enjoined from so attempting to practice, as has been the case in law,¹⁶ medicine,¹⁷ and dentistry.¹⁸ Such prediction is especially true in Illinois by reason of the recent amendment to the Optometry Act¹⁹ increasing the educational standards required for granting the license. Future scientific developments in this field together with such increased curriculum of study will pave the way toward making the practice of optometry a learned profession.

E. JUSTUS

WILLS—RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—WHETHER OR NOT VOLUNTARY PARTITION BETWEEN TESTATOR AND OTHER TENANTS IN COMMON AFTER MAKING OF WILL OPERATES TO ADEEM DEVISE THEREIN OF TESTATOR'S UNDIVIDED INTEREST—The recent case of *Brady v. Paine*¹ presented an unusual problem of law such as has been experienced by few American courts. The plaintiffs therein sued for partition and an accounting, claiming as heirs at law of one Clarence Melvin Brady. They named as defendants the other surviving heirs. These defendants, by counterclaim, sought a construction of the will of their ancestor to

¹³ *Georgia State Board v. Friedman's Jewelers*, 183 Ga. 669, 189 S. E. 238 (1936).

¹⁴ *State ex rel. Atty. Gen. v. Gus Blass Co.*, 193 Ark. 1159, 105 S. W. (2d) 853 (1937).

¹⁵ *Williams v. Mack*, 202 Minn. 402, 278 N. W. 585 (1938).

¹⁶ *Smith v. Illinois Adjustment Finance Co.*, 326 Ill. App. 654, 63 N. E. (2d) 264 (1945).

¹⁷ *People, by Kerner v. United Medical Service*, 362 Ill. 442, 200 N. E. 157, 103 A. L. R. 1229 (1936).

¹⁸ *Dr. Allison, Dentist, Inc. v. Allison*, 360 Ill. 638, 196 N. E. 799 (1935).

¹⁹ Ill. Rev. Stat. 1945, Ch. 91, § 93. Students undertaking the study of optometry subsequent to July 1, 1946, must cover a four-year curriculum instead of the two-year course previously required.

¹ 391 Ill. 596, 63 N. E. (2d) 721 (1945).

the effect that the entire interest in the premises in question had been vested in one of them under Brady's will. By his will made in 1924, Brady had devised his undivided one-half interest in a certain eighty-acre tract to his daughter subject to a life estate in favor of his wife. Subsequent to the making of the will, but prior to his death, Brady entered into a voluntary partition of the tract whereby he gained an interest in severalty in the south half thereof and gave up all rights in the north portion to his former tenants in common. Upon Brady's death, followed shortly thereafter by the death of his widow, the plaintiffs contended that this voluntary partition had worked at least a partial ademption of the devise and that, as no disposition had been made of the one-half of the south forty acres acquired by that arrangement,² such portion passed by descent to Brady's heirs. The trial court nevertheless held that the partition had not worked an ademption and granted a decree upon the counterclaim. On direct appeal to the Supreme Court because a freehold was involved,³ that court affirmed such holding.

The decisive question thus presented turns on the point as to whether or not the testator, after the voluntary partition, retained the interest which he had theretofore enjoyed or had thereby acquired a new estate not previously owned. In holding as it did, the Illinois Supreme Court came to the conclusion that the consequence of a voluntary partition is to leave each party with precisely the same title and estate which he held before the partition except that what was previously a joint possession has thereafter become a several one. Each of the parties holds title not by reason of the deeds of partition but because of the prior deed which had created the original tenancy in common. These results had been attained in earlier cases decided in this state which had not involved the aspect of ademption,⁴ so the extension of these doctrines to the instant situation is not without foundation.

On the specific question of ademption, the general rule has been that a conveyance by the testator, either partial or total, of lands specifically devised will operate as an ademption or revocation of the devise,⁵ for the subject matter thereof is no longer in existence at the time the will

² Plaintiffs admitted that the undivided interest in the south half of the tract which the testator had owned prior to the partition was still in him at the time of his death, hence passed by the will: 391 Ill. 596 at 600, 63 N. E. (2d) 721 at 723.

³ Ill. Rev. Stat. 1945, Ch. 110, § 199.

⁴ *Cole v. Cole*, 292 Ill. 154, 126 N. E. 752, 38 A. L. R. 719 (1920); *Cochran v. Cochran*, 277 Ill. 244, 115 N. E. 142 (1917); *Casstevens v. Casstevens*, 227 Ill. 547, 81 N. E. 709, 118 Am. St. Rep. 291 (1907).

⁵ *Melly v. Knox*, 269 Ill. 463, 110 N. E. 56 (1915), affirming 191 Ill. App. 126 (1915). A legacy already adeemed is not revived by a subsequent codicil republishing the will: *Tanton v. Keller*, 167 Ill. 129, 47 N. E. 376 (1897).

becomes operative.⁶ While some states would hold that reacquisition of the property by the testator prior to his death would prevent revocation of the devise, since the will does not speak until the time of the testator's death,⁷ an earlier holding in this state would deny such result on the theory that the will was revoked in this respect upon the making of the conveyance and could not operate as to after-acquired property except through some republication of the will or through a properly drafted residuary clause.⁸ In order to support the devise in the instant case, therefore, it was necessary for the court to hold that the property in question had never been alienated by the testator subsequent to the making of the will. In coming to that conclusion, the court was aided by two decisions, one from Delaware⁹ and one from Kentucky,¹⁰ which are the only known earlier cases specifically involving the instant situation, as well as by principles already enunciated concerning the effect of a voluntary partition.

The holding in the instant case is a logical extension of these doctrines and serves to create another exception to the general principles concerning ademption or revocation of devises. As a voluntary partition does not vest any new estate in the several parties but merely severs the unity of possession, any other holding would have been unfortunate and contrary to the view that failure on the part of the testator to change his will must be regarded as evidence of an intention to have the same stand as originally drafted.¹¹

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⁶ But see *Lewis v. Hill*, 387 Ill. 542, 56 N. E. (2d) 619 (1944), affirming 322 Ill. App. 68, 53 N. E. (2d) 736 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 278, to the effect that the sale of the subject of a specific devise by court order for the benefit of an incompetent testator operates merely to transfer the rights of the devisee to the fund.

⁷ See *Hopper's Estate*, 66 Cal. 80, 4 P. 984 (1884); *Woolery v. Woolery*, 48 Ind. 523 (1874); *Morey v. Sohler*, 63 N. H. 507, 3 A. 636, 56 Am. Rep. 538 (1886); *Gregg v. McMillan*, 54 S. Car. 378, 32 S. E. 447 (1899).

⁸ *Phillipe v. Clevenger*, 239 Ill. 117, 87 N. E. 858, 16 Ann. Cas. 207 (1909).

⁹ *Duffel's Lessee v. Burton*, 4 Harr. (Del.) 290 (1845).

¹⁰ *Weber v. Dickinson*, 248 Ky. 552, 59 S. W. (2d) 14 (1933).

¹¹ *Eckardt v. Osborne*, 338 Ill. 611, 170 N. E. 774, 75 A. L. R. 509 (1930).